IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., *et al.*,
Petitioners,

v.

ARLINGTON COUNTY BOARD, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Jerry K. Emrich
County Attorney
Charles G. Flinn
Counsel of Record
David R. Lasso
1400 North Courthouse Road
Room 106
Arlington, Virginia 22201
(703) 558-2705
Counsel for Arlington County Board

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OPPOSITION TO JURISDICTION

The Court is without jurisdiction to consider this petition under 28 U.S.C. §1257(3) because the question of procedural due process under the Fourteenth Amendment to the Constitution of the United States was not raised in the Court below. The initial pleadings in the trial court did refer

to the Fourteenth Amendment, but neither the Fourteenth Amendment nor the phrases "due process" or "procedural due process" (now advanced as a basis for relief) were referred to by the petitioners during the trial or in their arguments prior to the judgment of the trial court. The contention of the petitioners at trial was merely that the Virginia legislation enabling local governments to enact zoning ordinances requires a local governing body to evaluate the effect of any traffic congestion which may result from a zoning action as well as any resulting environmental pollution. Significantly, in the Virginia Supreme Court no violation of the Federal Constitution of any kind, including a violation of the Fourteenth Amendment, was "assigned as error". Rule 5:21 of the Rules of the Supreme Court of Virginia provides in part, as follows:

> "Only errors assigned in the Petition for Appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below."

It is true that in footnote 37 on page 37 of the Petition for Appeal to the Virginia Supreme Court the petitioners stated that the "Board Action of February 25, 1976 constituted a violation of the Board's duty under the Fourteenth Amendment [of] the Constitution of the United States." Footnote 37 went on to say:

> "Although precluded by this Petition's pagination limit from fully setting forth that argument, appellants nevertheless preserve it for consideration on appeal."

This was not a footnote to an assignment of error or statement of question presented, but merely a footnote in the body of the petitioner's Virginia argument. Arlington County contends that this passing reference was not a proper assignment of error.

Assuming that there was a proper assignment of error under Virginia law, the record still does not show that there was a fair reliance by the petitioners on the Federal Constitution nor were the lower courts or the adversaries of the petitioner given any basis for discussing and considering a Fourteenth Amendment argument. At no point prior to the filing of the petition for a writ of certiorari did the petitioners make any showing or statement from which any observer could tell whether they were relying on the Equal Protection or Due Process clause of the Fourteenth Amendment or whether their argument, if it was a due process argument, was asserting a substantive or a procedural due process claim. Thus the necessary jurisdictional basis for review is absent. *Hill* v. *California,* 401 U.S. 797, 805 (1971). This Court should find that it has no jurisdiction to consider the Petition for a Writ of Certiorari.

OPPOSITION TO PETITIONERS' STATEMENT OF QUESTION PRESENTED

Arlington County is compelled to take the somewhat unusual step of disputing the question alleged to be presented, because the factual basis for the question posed by the petition is not present. Although the petitioners phrase the question as if they had done so, at no stage of the trial did they make any issue of the effect of the action challenged on their property values. There was no evidence of any kind of any effect on the fair market value of their property. The trial court found (p. 3a of App. A to the petition) that there was no such effect.

The petitioners also did not prove that the County Board did not "ascertain the dimensions of the public welfare problems involved...." Neither did they prove "that the proposed development will cause an apparently insoluble public welfare problems [*sic*] of unmeasured dimensions in terms of traffic, [and] pollution...." (See App. A of the

petition, pp. 5a, 7a, 8a, and 9a paragraph 2.) Since the factual basis for the question alleged to be presented by the petitioners is not present in this case, the petitioners are mistaken when they argue that such a question is presented for review by this Court.

Moreover, even if the existence of the facts which the petitioners assert as a basis for review is assumed, it is not clear that these facts present a *procedural* due process question for review. In order to consider a procedural due process question, it is necessary to know whether or not the decision for which review is sought is legislative, administrative, or judicial. By using the phrase "a state zoning body" and the word "authorize", the petition avoids the question of what kind of decision is being considered. When it is understood that the decision being challenged is legislative (as Arlington County's agrument which follows will assert), it can be seen that the question really being stated by the petitioners is as follows:

> Where a state legislative body after statutory notice and hearing is considering zoning legislation applying to a particular parcel of property which would change the use permitted and increase slightly the right of the property's owner to use the property, and the opponents of the legislative act allege that the act will have harmful results, may the state legislative body enact the legislation, assuming they have been shown to have done so without ascertaining the dimensions of the harmful effects alleged?

Stated differently, the question would be:

> Does the enactment of zoning legislation after statutory notice and hearing, changing the

> regulations with respect to a particular land owner's property and promoting its development, deprive persons who would suffer from the allegedly harmful consequences of the legislation of the procedural due process guaranteed by the Fourteenth Amendment?

RESPONDENTS' STATEMENT OF THE CASE

Arlington County has previously reminded the petitioners that it disputes the facts they have alleged to exist. The many factual errors in the petitioners' statement of the case will not be catalogued. This statement will try to give a brief picture of the events up to this time, and after that, certain of the disputes will be pointed out.

The 116 acres in question are generally south and across Interstate 95 from the Pentagon. Before the land use actions under consideration, only about 16 acres were developed, and those by warehouses along the eastern side. A Western Electric Plant near the middle of the area is not part of the 116 acres. (Since the decision of the trial court, development has begun on the southeast portion.) Development of the tract has been expected for many years. At least since the time it was known that a metrorail station would be located in the center of the tract, much time has been spent by those concerned with land use planning in Arlington reviewing the question of the best uses for this tract. In 1974, the land was designated as a "Coordinated Development District" on the General Land Use Plan (Ex. PX1) of the County. In 1973, a new zoning classification was added to the county code designed particularly for metro transit corridors (known as C-O 2.5). About 24 of the 116 acres were in a zoning classification allowing more use than this new classification and the remainder was in either medium density apartment categories or under industrial classification.

For several years, the County planning staff, a planning firm hired by the landowners, and residents of the area of Arlington south of Interstate 95 worked together to develop plans for these 116 acres. In 1975, a plan was presented to the County Board under which the land would be rezoned to the new C-O 2.5 zoning category, and site-plan approvals would be given for the precise intensities of offices, apartment buildings, hotels, retail shopping and other uses such as apartments for retired people and a nursing home. The plan originally presented in 1975 for legislative action would have allowed slightly more uses than were likely to have occurred under the old zoning classifications, with reasonable approvals. However, after the granting of the zoning and the giving of the approvals, the plan approved by the legislative action of the County Board was about the same as those likely to have occurred under the old zoning with reasonable approvals. (Transcript XX, pp. 77-88.) The difference was that the various uses approved could be placed throughout the entire area of the site and concentrated in different areas than they could have been under the old zoning, so that an area once zoned for apartments might end up with offices and vice versa.

The actual plan approved is as follows:

Office Area	Hotel Units	Commercial Area	Apartment Units
1,250,000 sq. ft.	2,000	800,000 sq. ft.	6,200

The total number of square feet in the buildings approved is just slightly more than twice the number of square feet in the land. (Transcript XX, p. 114.) This is what is known as a 2.0 Floor Area Ratio (F.A.R.). The zoning category in question allows up to a 2.5 F.A.R. The characteristic zoning category in the Rosslyn and Crystal City districts of Arlington allows up to a 3.5 F.A.R. The characteristic zoning category (C-4)

in which office buildings and hotels are being built in the K Street, N.W. area of the District of Columbia has an F.A.R. of 8.5 to 10.0. (§5301.1 and §5301.2 Zoning Regulations of the District of Columbia — 1973 Reprint). The plan observes current canons of land use and transportation planning. Its balance of offices, hotel units, commercial space and apartment units is consistent with approved notions of how urban development should take place. In order to encourage healthy patterns of use in cities and to reduce the dependence on the car, which is widely believed to cause dangerous air pollution and over-consumption of scarce fuel, such mixtures and location of uses are encouraged. It is also believed that a more humane pattern of living occurs when offices, commercial activities and residential units are mixed in the areas near the center of cities where persons who like an urban style of life choose to live. Pentagon City is near the established, densely developed areas of the Washington, D.C. region. Therefore the concentration of new metropolitan growth at Pentagon City is calculated to avoid the increase of vehicle miles travelled throughout the region likely to result from the concentration of developent at locations like those near the Capital Beltway. Its location near an operating metro station is considered ideal. After the hearings on the zoning application got under way, opposition to the proposed changes developed, mainly from persons residing in the mostly single family district south of the tract and the existing apartment houses to the west (where all of the petitioners live). These persons argued that the increase in traffic caused by the development and the pollution from that extra traffic would be horrendous. The land use planners and transportation planners responded that these problems were exaggerated and that they were area-wide problems. From the point of view of those trying to fight the regional problems of traffic and air pollution, as well as other problems, the location of the proposed development here, rather than elsewhere, was indicated. The foregoing could be expanded but it is the

perspective from which Arlington County believes this Court should review the case.

The report referred to by paragraph (3) of the petitioners' statement of the case in no sense presents the position of the County Board. It was a 1973 report entitled Arlington Ridge Neighborhood Conservation Plan (Ex. PX4) and the quotation in the petition represents an instance of the County's continuing concern to protect its residential neighborhoods from excessive traffic and parking. While such traffic and parking sometimes reduces property values, it is improper to conclude in this case that the traffic and parking has adversely affected the value of any property of the petitioners. The petitioners have proved no effect on their property values. See petitioners' App. A at page 3a, where the trial court found: "the plaintiffs have not proved in terms of dollars that their specific property interests will be harmfully affected by the increased traffic."

Paragraph (4), which refers to "a huge physical plant" with "a vast physical capacity", gives a misleading impression. As stated above, the development approved provides for barely more than twice as many square feet of floor space in the buildings approved as there are square feet of land in the tract. This is as if the property owners had been granted the right to build a two-story building over the entire tract.

Paragraph (5) stating that the traffic study showed "without dispute" that traffic jams would occur, is also in error. The study in question did not show that at any intersections there would be any jammed traffic conditions at any time. What it showed was that if vehicular traffic was entirely banned in the residential neighborhoods nearby, if all the other multi-unit residential and commercial development besides Pentagon City occurred, and if Pentagon City were built to a higher density than actually was approved,

then there would be either E or F levels[1] of traffic service at key intersections in the morning and evening rush hours in 1990.

Paragraph (6) is not true. The Arlington County Transportation Commission is not a sister agency of the Arlington County Board. It was not created in recognition of the inexpertise or expertise of anyone. It is an advisory board like the Commission on Aging, Parks and Recreation Commission, Historical Commission and numerous other such boards which have been created by resolution and not by ordinance of the Arlington County Board. So far as the County knows, there is only one expert in Transportation on that board and that is Ronald Sarros who has been head of Transportation Planning for the Washington Metropolitan Council of Governments. Unlike a majority of the Commission, Mr. Sarros voted in favor of the plan originally proposed which was more intense than the one under attack here.

Paragraph (7) is also false. The experts in Traffic Engineering and Transportation Planning employed by the County reviewed the development and had no fears for the traffic consequences; they found the development a means of promoting their goals which are the goals of professionals concerned with traffic and pollution problems. Although the Board may have been warned about possible traffic

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[1] An E level of traffic occurs during any hour when an intersection has between 80% and 100% of its capacity throughout the hour. An F level occurs when more than 100% of capacity occurs during an hour long period. A problem with the use of E and F designations is that they sometimes gain naive acceptance by those who believe that traffic capacities can be measured more precisely than reality shows. It is difficult, first of all, to measure the capacity of an intersection and, secondly, to predict the amount of traffic that will flow through that intersection on some future date. (Transcript XV, pp. 24-25.)

congestion in 1990, no experts in the field ever warned the Board, except the study referred to above in the discussion of paragraph (5). That study used artificial assumptions for a development denser that the one approved and was discounted by the experts.

The County has never agreed that a vested right was conferred upon the developers on February 25, 1976, because no one responsible for making such decisions on behalf of the County has ever evaluated that question. The County also disputes paragraphs (11), (12), (13) and (15) of the petitioners' statement. The conclusions stated in paragraphs (11) and (12) are based on questionable standards[2], and on additional false assumptions made by the statistician-petitioner who calculated the mile-long queues and the speeds of one mile per hour. Similarly, no "breakdowns" in the traffic system were proved. The misunderstanding referred to in pararaph (15) is not a misunderstanding of the trial judge but of the petitioners. What the trial judge found is that the petitioners did not prove that reasonable men, or even reasonable experts, would agree that the petitioners' predictions were correct. (See App. A to petition, last paragraph, p. 7a concluding on p. 8a.) The County does dispute that the petitioners have proved that there was no disagreement (in the sense intended by the petitioners) among experts or others during the Board hearings on the matter. The petitioners have simply not proved this negative point. It is, however, their burden and if they had offered any evidence of their contention, then the County would have been in a position to rebut that evidence.

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[2] See footnote 1 on p. 9 of this brief in opposition.

REASONS FOR DENYING THE WRIT

As a threshold factual matter, it is clear that the challenged decision of the Arlington County Board will *not* have a direct adverse impact upon the property interests of the present petitioners and that the petitioners are *not* therefore in a position to present the constitutional claims here asserted.

If the petitioners were in a position to present the claims now asserted, then the primary reason that their petition should be denied is because the factual basis for their claim did not exist. They never proved it was reasonable to predict the horrendous traffic jams they rely upon or the increase in air pollution which would result from such traffic jams. In fact, the trial court found that this development will result in less air pollution and traffic congestion because of its balance of uses and its location near a metrorail station. (Petitioners' App. A, pages 5a, 8a and 9a.) The petitioners never proved that the Board did not make a reasonable investigation of the total traffic and air pollution problems, nor did they prove that the Board did not thereafter rationally strike the balance in favor of the development.

No procedural due process question is presented even if it is assumed for the purposes of the argument (1) that this Court has jurisdiction to consider this petition, (2) that the petitioners have rights which are affected by the action in question, and (3) that the factual basis for presenting the question is present. Any due process question which might be presented can be answered by an analysis of existing precedents and no useful purpose would be served by reviewing and affirming the decisions of the courts below in order to restate the principles in question.

It is unfortunate that the petitioners have not cited this Court to any procedural due process cases which stand for the proposition that the petitioners advance as a requirement for procedural due process by state legislative bodies

concerning zoning legislation. The cases of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), involve substantive and not procedural due process. This Court has recently made clear that it considers a zoning action by a local governing body an exercise by that body of legislative power originally given it by the people. This is the reasoning of *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). The majority opinion in this case, written by Mr. Chief Justice Burger, discussed the cases of *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Company* v. *Roberge*, 278 U.S. 116 (1928). Those cases dealt with delegations by local city councils to a limited number of abutting property owners. The majority opinion speaks of the

> "thread common to both decisions [which] is the delegation of legislative power, originally given by the people to a legislative body and in turn delegated by the legislature to a narrow segment of the community..." *City of Eastlake* v. *Forest City Enterprises, supra*, at 677.

This supports the view of the law being advanced by Arlington County here. The zoning action of the Arlington County Board (like the Richmond and Seattle City Councils) is a legislative action and entitled to the review which is given to legislative actions.[3] The remedy for a property

[3] In Virginia, it is settled that the enactment and amendment of zoning ordinances is a legislative act. *Byrum* v. *Orange County*, 217 Va. 37, 39, 225 S.E.2d 369,371(1976) (making clear that the principle applies even to granting special use exceptions); and *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 443, 211 S.E.2d 48, 56 (1975), *cert. denied*, 423 U.S. 940 (1976) (applying the principle to local action rezoning particular parcels of property as well as comprehensive rezonings).

owner challenging a zoning restriction alleged to be erroneous is to challenge that restriction in state court on Fourteenth Amendment grounds. The review which is conducted in such cases goes to the question of whether or not the restriction being challenged is

> "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Ibid* at 676. (Citing *Euclid* v. *Ambler Realty Co., supra.)*

This judicial review of legislative actions provides opponents of zoning legislation with procedural due process, and a stranger to rezoned property or even a neighbor of it would have no greater right to challenge a rezoning than the property owner has. Arlington County would also urge the same distinction as that referred to in *City of Eastlake* v. *Forest City Enterprises, Inc., supra*, at 673-74. This is the distinction between administrative and legislative acts according to which there is a separation between

> "the power to zone or rezone by passage or amendment of a zoning ordinance, from the power to grant relief from unnecessary hardship." *Ibid.*

The granting of relief from unnecessary hardship is an administrative function which is usually delegated to boards of zoning appeals or boards of adjustments. An action of zoning or rezoning is legislative in nature.

The proper standard of review of such legislative actions when the issue of substantive due process is raised is the same as it is when the issue of equal protection is raised. This is the standard stated in *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961):

> "Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice White's dissent in *Moore* v. *City of East Cleveland, supra,* recognizes this point:

> "No case that I know of, including *Ferguson* v. *Skrupa* [372 U.S. 726 (1963)], has announced that there is some legislation with respect to which there no longer exists a means-end test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger bears the burden of demonstrating its unconstitutionality: and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn* v. *Illinois,* 94 U.S. 113 (1877), that 'if a state of facts could exist that would justify such legislation,' it passes its initial test." *Ibid* at 548.

This is the substantive due process to which the petitioners are entitled in cases of this nature. *Euclid* v. *Ambler, supra,* and *Moore* v. *City of East Cleveland, supra,* stand for no other proposition. It is true, of course, that infringement of a certain class of liberty interests or the classification of certain suspect categories will require greater scrutiny, and *Moore* v. *City of East Cleveland* happens to be one such case. However, the petitioners are not alleging any such protected liberty interest nor do they claim that they are members of a suspect classification being treated as such.

When the petitioners argue, as they do on page 13 of the petition, that *Euclid* v. *Ambler* and *Moore* v. *City of East Cleveland* stand for the following proposition and that it is a procedural due process question, they are mistaken:

> "Implicit in this reasoning process are the clear dual premises (1) that every state zoning body has an affirmative duty to weigh the various factors, pro and con, and reach its own decision as to where the public welfare lies, and (2) that it would be constitutionally improper for such a body either to refuse to consider the various factors or to promulgate a zoning decision without having done so if private property interests would be adversely affected thereby. [*sic.*]"

This is not only an erroneous analysis of the cases cited by the petitioners and a confusion of substantive due process and procedural due process, but it is also an effort to persuade this Court that it should inquire into the wisdom of actions by state legislatures.

The procedures to be followed in the case of amendments of the zoning ordinance were set forth in §15.1-431 (Va. Code Ann. 1975). The petitioners do not allege the violation of or failure to comply with any of these provisions. The District of Columbia case and the state cases cited by the petitioner are not appropriate. *Citizens Association of Georgetown, Inc.* v. *Zoning Commission of D.C.,* 477 F. 2d 402 (D.C. Cir., 1973), makes clear that the D.C. Zoning Commission "is not required to support its legislative-type judgments with findings of fact." *Id.* at 408. Arlington County agrees that different standards are applied to administrative decisions. The standards applied in the *Citizens Association* case are standards which, where proper, are applied by courts reviewing administrative

agency decisions. This is not the place to analyze the exact relationship between the statutory requirements for review of administrative agency decisions and the procedural due process requirements which the Fourteenth Amendment imposes on such decisions, because this is a case involving a legislative decision by a popularly elected state legislative body.

The case of *Brandon* v. *Board of Commissioners,* 124 N.J.L. 135, 11A.2d 304 (1940), cited by the petitioners, deals with the question of the review to be given a decision of a local Board of Adjustment, an administrative board. The cases of *Vece* v. *Zoning and Planning Commission,* 148 Conn. 500, 172 A.2d 619 (1961), and *Price* v. *Cohen,* 213 Md. 457, 132 A.2d 125 (1957), cited in the petition, involve interpretations by state courts of the requirements which the state enabling legislation imposes on local bodies enacting zoning legislation.[4] These cases formed the basis of the petitioners' argument in the Virginia Supreme Court, but were not cited in the trial court. The requirements imposed on local legislative bodies by state enabling legislation are questions of state law and not questions of federal procedural due process; they should not be considered by this Court.

The proper light in which to see this case is one in which the petitioners have been fully heard during the legislative process and in a judicial review on trial de novo lasting many days. The County Board's decision after all the hearings was based on professional reports from the planning staff and others. They make no complaint about any defect in the

[4] Arlington County interprets those cases as imposing certain positive requirements on local legislative bodies enacting piecemeal rezoning ordinances. Those requirements have not been adopted in Virginia. See *Fairfax County* v. *Snell,* 214 Va. 655, 202 S.E.2d 889 (1974).

procedures of the trial. They now continue to challenge the wisdom of the legislative action of the County Board by raising a spurious procedural due process issue. In fact, the balance has been struck in this case and the petitioners' introduction of this issue at this stage simply reflects their disappointment with the legislative decision and the judicial review of that decision. The standards to be applied to the review of such legislative decisions have been made clear by the Court and no purpose would be served by undertaking a review which would reach a predictable result. It would be especially inappropriate in this case because the petitioners have unreasonably withheld their assertions of violations of procedural due process until this late stage.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Charles G. Flinn,
Counsel of Record
Jerry K. Emrich
David R. Lasso
1400 North Courthouse Road
Room 106
Arlington, Virginia 22201
(703) 558-2705
Counsel for Arlington County Board